

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Petition For Declaratory Ruling Concerning)
 The Requirement For Good Faith Negotiations)
 Among Economic Area Licensees and Incumbent)
 Licensees in the Upper 200 Channels of the)
 800 MHz Band)

PR Docket No. 93-144

To: Chief, Wireless Telecommunications Bureau

COMMENTS OF SMALL BUSINESS IN TELECOMMUNICATIONS

Small Business in Telecommunications (SBT), a non-profit association of hundreds of small telecommunications firms which include both EA licensees and incumbent licensees within the upper 200 channels of the 800 MHz band, hereby comments to the above captioned request for declaratory ruling regarding good faith negotiations among licensees pursuant to 47 C.F.R. § 90.699.

Nextel Communications, Inc.'s ("Nextel's") contention regarding the type or amount of information provided by licensees to facilitate negotiations in accord with Section 90.699 of the Commission's Rules, i.e. that licensees who fail to comply with Nextel's demand for certain technical information may not be evidencing requisite good faith, is without foundation or merit and is contrary to the facts, logic and law.

The issue is simply one of proper negotiations. The type of equipment employed by an incumbent is not relevant to the terms of an agreement which is drafted in accord with the Commission's Rules and decisions. Nextel has the responsibility to guarantee that it will provide a seamless transition, employing comparable facilities and frequencies, to assure that the incumbent

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and its end users are given those assurances guaranteed by the Commission. However, Nextel's request for technical information is not predicated on these obligations. Instead, it is predicated on Nextel's improper assumption that a "retune" is the same as a seamless transition. Accordingly, Nextel's efforts are directed at determining the retunability of a given system at a given cost. Those efforts are not consistent with Nextel's obligation to provide and fund a seamless transition from one group of channels to another.

Nextel's inquiry is regarding the type of equipment in place, the frequencies employed,¹ and the type of trunking format used. Although this information may be required as a portion of the attachments to a negotiated agreement regarding a seamless transition,² it is certainly not a condition precedent to the commencement of negotiations, as is strangely suggested by Nextel. Nextel's suggestion that NO negotiations may be commenced unless and until that information is provided is simply wrong. For example, a negotiated agreement may state the following:

Nextel hereby agrees to provide that transmitter, antenna, coaxial cable, combiner, controller and such other devices and equipment which are necessary for the construction of a replacement system, which system will provide, employing alternative frequencies, no less than that level of service which is presently offered by incumbent and enjoyed by incumbent's end users.

The contract terms are not dependent upon knowing, prior to contract drafting, the identity of the incumbent's system trunking format, the number of end users, or the type of combiner. Simply

¹ As an aside, Nextel requests information which is a matter of public record, i.e. the channels employed by incumbents. Certainly Nextel's request for declaratory ruling is not based on these inquiries which could be satisfied by simply referring to the public record.

² SBT is not aware of any instance where an incumbent which has entered into an agreement with Nextel has not provided that technical information to Nextel prior to commencing the relocation process. This information would naturally be provided as a portion of the contracting parties' cooperation in causing the relocation via a seamless transition.

put, a relocation agreement need only echo those obligations set forth in Section 90.699 without regard to the equipment employed by the incumbent. The Commission's Rules are equipment neutral, thus Nextel's offer should be technically neutral in nature, without regard to specific equipment.³ It is enough that Nextel promises to comply with Section 90.699 and the Commission's decisions. That Nextel has chosen unilaterally to turn the receipt of technical information into a condition precedent to contract negotiations has certainly slowed the negotiation process in a number of cases. But that delay is squarely at the feet of Nextel, not the incumbent.

The issue (such as any exists) is not, therefore, when the technical information is given. The issue is the relevant use of that information. Obviously that information is unnecessary to commence the process, despite Nextel's claims to the contrary. Additionally, SBT's members have noted that once Nextel is given this information, Nextel responds with standard "retune" contract, not an agreement which provides for a seamless transition. Therefore, Nextel's claims are belied by its own practices. The Bureau may further note that none of the information requested by Nextel appears as a portion of the terms of the Nextel "retune" agreement. Therefore, SBT is at a loss to explain Nextel's purported belief that the information is necessary to commence negotiation of a contract that does not incorporate that same information.

SBT's members are willing to comply with their individual duties as incumbents of EA licensees to engage in good faith negotiations in accord with Section 90.699. However, before the

³ Does Nextel suggest that only certain kinds of transmitters or combiners or antennas or numbers of mobile units are eligible for relocation? And that its decision to proceed to negotiations is dependent on whether a licensee employs LTR or Motorola equipment (a distinction which Nextel could discover simply by off-air monitoring)? How is Nextel separating eligible versus non-eligible incumbents for immediate relocation? And if no such division or priority exists, what possible difference does it make to Nextel whether negotiations commence without regard to those technical issues?

Bureau decides this matter, perhaps the Bureau should first examine a sample agreement offered by Nextel to incumbents. The Bureau will quickly note that the agreement is to retune systems, not to construct those facilities necessary for a seamless transition to comparable facilities and spectrum.

Notwithstanding Nextel's standard agreement, the Bureau may further note that any assistance Nextel might seek from the Bureau is tolled until the commencement of the Involuntary period, which Nextel has successfully had delayed for an additional three months. Accordingly, even if there were substance to Nextel's request, which there is not, Nextel, by its own motion, has rendered its comments wholly premature.

Nextel's suggestion of a revocation proceeding arising out of an incumbent's refusal to abide with Nextel's mandated methods is ridiculous. By this self-serving, outrageous suggestion, Nextel has fully demonstrated that its singular concern is for its own methods, timetable, and means; and not for persons' compliance with the Commission's Rules. Further, Nextel would have the Bureau revoke licenses, thus terminating service to thousands of end users, just so Nextel's negotiations methods are complied with. Not only would such actions be wholly contrary to the public interest, this suggestion is without legal support. In Nextel's world, due process is Nextel's processes. Fortunately, that world does not extend to the Bureau, the Commission, or the Courts.

Finally, the Bureau is not positioned to create a "presumption" of bad faith simply because an incumbent does not go along with Nextel's inflexible methods. SBT notes that Nextel has rejected all others methods of negotiation except its own, even methods offered by incumbents to negotiate in good faith an agreement to cause relocation.⁴ Will the Bureau entertain complaints from these

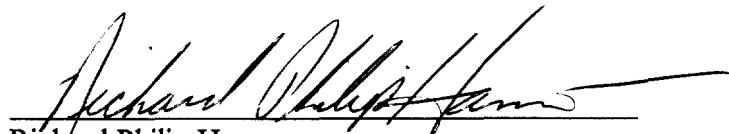
⁴ Nextel has within its files entire draft relocation agreements prepared by incumbents which are intended to commence and forward the relocation process. It is SBT's belief that Nextel has summarily rejected each such agreement, refusing to even discuss the offered terms therein. Instead, Nextel insists on its own draft agreement for all purposes. Is this bad faith on Nextel's part? Based on Nextel's theories forwarded in this matter, the answer would be yes.

spurned incumbents that Nextel has not engaged in good faith negotiations? Will Nextel surrender its EA license if the Bureau determines that Nextel rejected those offers? Will Nextel agree to a presumption of bad faith in its negotiations for each instance where Nextel summarily rejected an incumbent's suggested methods for negotiation? Obviously not. But if the Bureau is to provide equal protection among negotiating parties, then adoption of Nextel's suggestions would require that Nextel be afforded equal treatment. Thus, the logical extension of Nextel's arguments should cut both ways and SBT would be pleased to provide to the Bureau a preliminary list of circumstances where revocation of Nextel's licenses would be appropriate.

In conclusion, Nextel's position is premature and based on an incredible arrogance which states, in effect, "if we don't get what we want, when we want it, in the manner we want it, the Bureau should punish the other party". The last time SBT checked, the Bureau served the public interest, not Nextel's private agenda. Unless some legislative action has changed Title 47, SBT respectfully suggests that the Bureau direct Nextel to stop its whining and commence meaningful negotiations to cause seamless transition of incumbent systems, rather than promoting the ersatz deals memorialized by Nextel's standard retune agreement and offered as a "take it or leave it" proposition.

Respectfully submitted,

SMALL BUSINESS IN TELECOMMUNICATIONS

A handwritten signature in black ink, appearing to read "Richard Philip Hanno", written over a horizontal line.

Richard Philip Hanno
Schwaninger & Associates, P.C.
1331 H Street, N.W., Suite 500
Washington, DC 20005
(202) 347- 8580

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